SIM YEOW SENG (M) SDN BHD

v.

KOH KOK PENG

COURT OF APPEAL, KUALA LUMPUR
ALAUDDIN MOHD SHERIFF JCA
NIK HASHIM JCA
ABDUL WAHAB PATAIL J
[CIVIL APPEAL NO: W-02-09-2000]
15 MARCH 2004

CONTRACT: *Breach - License agreement - To carry out quarry works for three years - Whether licensor breached agreement by subsequently granting license to another - Three-year period to run from commencement of quarry works - Whether quarry works commenced from date land was cleared - Whether quarry works commenced from date police permit was issued for blasting*

This was the appellant's appeal against the decision of the High Court judge who found in favour of the respondent in his claim against the appellant for breach of contract. By an agreement dated 30 October 1986, the appellant had granted a license to the respondent to enter the appellant's land to extract and remove granite and carry out quarry works for three years from the date the respondent commenced the quarry works. Some time later, the appellant entered into an agreement dated 24 May 1990 with another company granting it license to do the same. The issue herein was whether the appellant's license agreement with the respondent had ended before the appellant entered into the subsequent license agreement with the other company. The appellant contended that quarry works included the felling of trees, the building of access road to the site and the removal of overburden that went towards the extraction of stones from the quarry. Accordingly, quarry works commenced on 25 May 1987 when the clearing of the land took place. The respondent argued that the quarry works actually started on 8 August 1987 when the blasting took place after the police permit for it was issued on 2 August 1987.

Held (dismissing the appeal):
Per Nik Hashim JCA

[1] Preparatory works such as the clearing of the trees, the construction of the access road to the site and the removal of overburden on the said land before the police permit for blasting was obtained, were not quarry works. Quarry works as contemplated by the parties were such as could only commence after the relevant permits and licenses had been obtained.

Support for this was found in cls. 1 and 8(d) of the agreement entered into by the parties herein. Therefore, as the police permit for blasting was obtained on 2 August 1987, quarry works as understood by the parties could not have commenced before that date. In view of the clear statement by the learned judge that he chose to believe the respondent, this appeal had no merit and should be dismissed with costs. (pp 500 e-g & 502 b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan yang arif hakim Mahkamah Tinggi yang membenarkan tuntutan responden terhadap perayu kerana pelanggaran kontrak. Melalui perjanjian bertarikh 30 Oktober 1986, perayu telah mengeluarkan lesen kepada responden untuk memasuki tanah perayu bagi tujuan mengambil dan mengeluarkan granit dan menjalankan kerja-kerja kuari selama tiga tahun bermula dari tarikh responden memulakan kerja-kerja kuarinya. Perayu kemudiannya memeterai perjanjian bertarikh 24 Mei 1990 dengan sebuah syarikat lain memberikannya lesen untuk menjalankan aktiviti yang sama. Isu yang berbangkit adalah sama ada perjanjian pelesenan perayu dengan responden telah berakhir sebelum perayu memeterai perjanjian pelesenan yang terkemudian dengan syarikat yang lain itu. Perayu mengatakan bahawa kerja-kerja kuari adalah termasuk penebangan pokok-pokok, pembinaan jalan masuk ke tapak kerja dan pembuangan 'overburden' yang terpaksa dibuat apabila mengeluarkan batu batan dari kuari. Oleh yang demikian, kerja-kerja kuari bermula 25 Mei 1987 apabila kerja-kerja penerangan tanah bermula. Responden berhujah bahawa kerja-kerja kuari hanya bermula pada 28 Ogos 1987 apabila kerja-kerja peletupan bermula selepas permit polis baginya dikeluarkan pada 2 Ogos 1987.

Diputuskan (menolak rayuan):
Oleh Nik Hashim HMR

[1] Kerja-kerja penyediaan seperti penebangan pokok-pokok, pembinaan jalan masuk ke tapak kerja dan pengalihan 'overburden' di atas tanah tersebut sebelum permit polis untuk kerja-kerja peletupan diperolehi, bukanlah kerja-kerja kuari. Kerja-kerja kuari sepertimana yang dijangkakan oleh pihak-pihak adalah kerja-kerja yang hanya boleh dimulakan selepas permit-permit dan lesen-lesen yang relevan diperolehi. Sokongan bagi hal ini didapati pada fasal-fasal 1 dan 8(d) perjanjian yang dimeterai oleh pihak-pihak di sini. Oleh itu, oleh kerana permit polis bagi kerja-kerja peletupan diperolehi pada 2 Ogos 1987, kerja-kerja kuari sepertimana yang difahamkan oleh pihak-

pihak tidak boleh bermula sebelum tarikh tersebut. Mengambilkira kenyataan jelas yang arif hakim bahawa beliau memilih untuk mempercayai responden, rayuan ini tidak bermerit dan harus ditolak dengan kos.]

Case(s) referred to:
Charter Reinsurance Co Ltd v. Fagan [1996] 3 All ER 46 ***(refd)***
Lim Kim Choy v. Wong Chow [1952] 18 MLJ 20 ***(dist)***
Saw Choo Theng & Anor v. Sungei Baik Tin Mines Ltd [1971] 2 MLJ 83 ***(dist)***

For the appellant - S Kandasivam; M/s PG Lim & Co
For the respondent - Balwant Singh Sidhu; M/s Balwant Singh Sidhu & Co

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim JCA:
This appeal is against the decision of the High Court entering judgment for the respondent's claim and damages to be assessed by the senior assistant registrar for breach of contract.

The facts are that the parties had entered into an agreement dated 30 October 1986 at pp. 139-146 of the appeal record. By this agreement, the appellant had granted license to the respondent to enter into the appellant's land to extract and remove granite and carry out quarry works for three years commencing from the date the respondent commences quarry works. It was a term that the respondent was to pay the appellant 80 sen for each ton of granite extracted and removed. The respondent with the consent of the appellant agreed with another party, Energoprojekt Engineering & Contracting Co., for this company to extract and carry out quarry works. This company ceased all quarry works on 24 September 1988.

Meanwhile, the appellant entered into an agreement with Hyundai Engineering Co Ltd dated 24 May 1990 at pp. 238-254 of the appeal record granting the said company license to extract and remove granite boulders from the same land for a period of three years from the date of the agreement.

Clause 1 of the agreement between the appellant and the respondent states:

> In consideration of the premises and the due and mutual observance and performance by the parties hereto of the provisions herein contained the Grantor shall grant a license to the Licensee to enter into the said portion for the purpose of extracting and removing granite only in the said portion and carrying out quarry works thereon for a term of three (3) years commencing from the date the Licensee commences quarry works.

The main issue before this court was when the respondent commenced quarry works.

The appellant's counsel contended that quarry works mean works towards extraction of stones from a quarry which includes felling of tress, building access road to the site and removal of overburden ie, all materials on top of granite. Learned counsel submitted that quarry works commenced on 25 May 1987 when the clearing of the land took place. This being so, the license agreement ended by effluxion of time on 24 May 1990 and therefore, the appellant was entitled to enter into the license agreement with Hyundai on 24 May 1990. Learned counsel then cited a Privy Council case of *Saw Choo Theng & Anor v. Sungei Baik Tin Mines Ltd* [1971] 2 MLJ 83 and a High Court case of *Lim Kim Choy v. Wong Chow* [1952] 18 MLJ 20 in support of his arguments.

Learned counsel for the respondent, on the other hand, argued that quarry works actually started on 8 August 1987 when the blasting took place after the Police Permit was issued on 2 August 1987.

Unfortunately, in this case, the learned trial judge did not make a finding of fact when the quarry works commenced. However, we agreed with the respondent. From the evidence, we held that the preparatory works such as clearing of the trees, construction of the access road to the site and removal of overburden on the said land before the Police Permit for blasting was obtained are not quarry works. Quarry works commenced when the Police Permit for blasting was obtained on 2 August 1987. Support for our finding can be found in cl. 8(d) of the agreement itself which reads:

> (d) The Licensee shall commence quarry works on the said portion within six (6) months from the date the last of the said Permits and Licences are obtained and failing which this agreement shall automatically forthwith terminate.

As the last of the permits was the Police Permit for blasting issued on 2 August 1987, the quarry works as understood by the parties could not have commenced before that date.

The two cited cases: *Saw Choo Theng* and *Lim Kim Choy* relied on by the appellant are indeed distinguishable on facts and therefore not applicable to the present case.

In *Saw Choo Theng*, the appellants had sought to have the sub-lease cancelled on the ground that the respondent therein had cut down budded rubber trees on approximately 60 acres of the land, without the consent and knowledge of the appellants and planted a commercial crop of tapioca, also without the appellants' consent and knowledge.

The trial judge made a finding that the respondent therein had cleared the land primarily to plant tapioca; he was not authorised to do so; it was done without government approval and was a breach of the Mining Enactment; and it ignored the rights of the appellants to the rubber trees which were preserved by the sub-lease.

On those facts, the cancellation of the sub-lease was justified, and at p 86 para A the court held that the whole purpose of the relevant cl. 4(b) of the sub-lease was to require an orderly working of the land, and that such operations as the sub-lease should be regulated and controlled. The court went on to give three cogent reasons in that case, applicable to its facts, and for those three reasons held that a proper construction of "work the land" in that case included preparatory work and indeed, any operations on the land.

In *Lim Kim Choy*, the court relied on the statutory interpretation of "mining operations" as contained in s. 3 of the Mining Enactment. The court gave its reasons for deciding in the manner it did at pp. 22 and 23 ie, to avoid a conflict between the sub-lease and the later agreement. It was in that context that the court had to consider whether "mining operations" had ceased in that case – a consideration irrelevant to the present appeal. There the court held that the sinking of bore holes amounts to a "mining operations".

Unlike in the aforesaid cases, the present case does not involve the application of the Mining Enactment, and thus the decisions therein are not quite relevant here.

On the cannons of interpretation of what the parties have meant in a contract, Lord Mustill in *Charter Reinsurance Co Ltd v. Fagan* [1996] 3 All ER 46 at p. 54 reminded:

> There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms.

In the case before us, cls. 1 and 8(d) of the agreement, read together, are sufficiently clear. The only interpretation of cl. 1 is that "quarry works" contemplated by the parties were such as could only commence after relevant permits and licences had been obtained. And in view of the clear statement by the learned trial judge that he chose to believe the respondent, we found that the appeal had no merit and dismissed the appeal with costs and ordered the deposit be paid out to the respondent to account of his taxed costs.